Court File No.: CV-21-00669445-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN ENTERPRISES INC.

FACTUM OF
FIRST CAPITAL HOLDINGS (ONTARIO) CORPORATION
(Comeback Hearing)

October 5, 2021

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PART I – NATURE OF THE OBJECTION

1. After having requested and received significant accommodations from First Capital Holdings (Ontario) Corporation ("**First Capital**") and other landlords throughout the Covid-19 pandemic, the principal of McEwan Enterprises Inc. (the "**Applicant**") has now commenced this CCAA proceeding with the express, substantive purpose of selling the Applicant's business to himself and his insider group – without a sale process, without consensus, without paying anything meaningful for the equity in the "restructured" business and without complying with section 36(4) of the CCAA.

2. What the Applicant proposes for this CCAA proceeding, in its current form, is neither a restructuring nor a liquidation. Rather, it is an entirely self-serving, abusive and preferential initiative to force-out one stakeholder and retain complete control of the business, without presenting a plan of arrangement and without allowing the Court to evaluate what parties other than the Applicant group may be prepared to offer for the business opportunity.

3. First Capital therefore opposes the continuation of this CCAA proceeding in the absence of the following substantive changes being made at the Comeback Hearing:

(a) first, and most important, the Applicant ought to be required at the Comeback Hearing to propose and then implement a satisfactory Court-approved marketing and sale process for the Applicant's assets and/or business, as applicable, with the input of the Monitor and stakeholders, prior to seeking Court approval for any sale transaction. The Applicant has already brought a motion returnable next week for Court approval of its "inside" deal, which is doomed to fail based on the foundational requirement in section 36(4) of the CCAA that, amongst other things, "*good faith efforts [be] made to sell or otherwise dispose of the assets to persons who are not related to the [Applicant]*;" and

(b) second, in conjunction with the foregoing sale process, and to render such sale process meaningful and in "*good faith*," the Applicant must provide thorough and satisfactory disclosure about not only the Applicant itself, but also about its subsidiary's 50% interest in the ONE Restaurant Partnership (as defined in the Initial McEwan Affidavit, as defined below). The subsidiary's interest in the ONE Restaurant Partnership appears to be one of the most important parts of the Applicant's business, yet virtually no meaningful disclosure has been provided. Interestingly, the subsidiary is not a CCAA applicant, but a stay of proceedings was sought for its benefit. The subsidiary is defined below as the "**McEwan Subsidiary**."

PART II - FACTS

4. The material facts do not appear to be in any real dispute (or ought not to be).

5. The Applicant's principal is Dennis Mark McEwan, who has been involved in the restaurant business as chef and restaurant operator since approximately 1982.

Affidavit of Dennis Mark McEwan [Initial McEwan Affidavit] at para. 1.

6. The Applicant operates a portfolio of high-end restaurants, grocery stores, food halls and catering services, and has experienced financial difficulties since 2017.

Initial McEwan Affidavit at paras. 1, 8, 80 and 83.

7. Two years later, in 2019, the Applicant opened a grocery location at the intersection of Yonge and Bloor Streets in Toronto, Ontario ("**McEwan Yonge & Bloor**"), the landlord of which is First Capital. According to Mr. McEwan, "*With the benefit of hindsight, the [Applicant] would not have entered into operations at this location based on the existing lease terms.*"

Initial McEwan Affidavit at para. 82.

8. More generally, Mr. McEwan advises that "*even prior to taking into account the impacts of the COVID-19 pandemic, the [Applicant] was facing financial challenges and a need to improve its financial performance and liquidity position.*"

Initial McEwan Affidavit at para. 83.

9. Both before and during the Covid-19 pandemic, First Capital and the Applicant entered into a series of lease amendment agreements in respect of McEwan Yonge & Bloor, the effect of which was to repeatedly lower the amount of minimum rent to be paid for this location.

Retail Lease dated April 27, 2018, as amended thereafter [McEwan Yonge & Bloor Lease], Exhibits to Cross-Examination of Dennis Mark McEwan conducted on October 4, 2021 [McEwan Cross-Examination].

10. In summary, the McEwan Yonge & Bloor Lease commenced in January 2019 with a stated monthly minimum rent in excess of $90,000 (or in excess of $1 million per annum), subject to a modest increase each year. However, by the end of that same 2019 calendar year, the Applicant had already successfully bargained with First Capital for multiple rent accommodations, such that the stated monthly minimum rent for December 2019 was approximately less than half the original amount. Further accommodations were provided in subsequent years, including during the Covid-19 pandemic, to the point whereby the Applicant was for a certain time no longer required to pay a fixed minimum rental amount at all, and instead was required to pay only a percentage rent amount tied to its sales.

McEwan Yonge & Bloor Lease, Exhibits to McEwan Cross-Examination.
Transcript of the McEwan Cross-Examination, at questions 200-203.

11. These later accommodations were provided in good faith by First Capital to the Applicant on the basis of the harm understood to be caused by the Covid-19 pandemic, notwithstanding that McEwan Yonge & Bloor remained open as an essential service (grocery store) during all Covid-19 lockdown periods.

Initial McEwan Affidavit at para. 86.

12. In addition to the assistance that it received from First Capital, the Applicant also received Covid-19 accommodations from other landlords and the government (amongst others).

Initial McEwan Affidavit at paras. 94 and 95.

13. The Applicant also obtained debt financing from a subsidiary of Fairfax Financial Holdings Limited ("**Fairfax**"). Mr. McEwan and Fairfax are the Applicant's only shareholders.

Initial McEwan Affidavit at paras. 35, 94 and 95.

14. Although Mr. McEwan swears that "*The [Applicant] has continued to honour its lease payment obligations, on the amended terms, pursuant to [the] lease amendments*," he also acknowledges that "*As at August 31, 2021, the [Applicant] had approximately $0.5 million of estimated rent arrears and deferrals outstanding*."

Initial McEwan Affidavit at para. 96.

The Applicant Begins Planning for CCAA Protection

15. Mr. McEwan swears that "*Commencing in the summer of 2021, the [Applicant] engaged legal counsel to assist it in reviewing and assessing its various potential options and alternatives*."

Initial McEwan Affidavit at para. 13.
***Companies' Creditors Arrangement Act* (Canada) [*CCAA*].**

16. The McEwan Subsidiary was then incorporated on August 12, 2021, and, shortly thereafter, acquired the Applicant's former interest in a luxury hotel restaurant located at the Hazelton Hotel in Yorkville, called ONE Restaurant (the "**Reviewable Insider Transaction**"). According to the Initial McEwan Affidavit, the McEwan Subsidiary "*assumed its interest in the ONE Restaurant Partnership from [the Applicant] in August 2021 with the consent of the ONE Restaurant Partner*." No financial disclosure is provided in the Initial McEwan Affidavit regarding the performance of the McEwan Subsidiary or its underlying business, notwithstanding that this appears to be an important part of the Applicant's business.

Initial McEwan Affidavit at paras. 18(b), 37 and 96.

17. Prior to cross-examination, the Applicant's counsel advised that "*Request for JV financials are not relevant and confidential*," and "*Partnership arrangements are not relevant and confidential*." These have not been produced by the Applicant to date.

Transcript of the McEwan Cross-Examination, at question 6 and corresponding cover email referenced therein.

18. Approximately one month after entering into the Reviewable Insider Transaction, the Applicant entered into a second insider agreement on September 27, 2021, this time with 2864785 Ontario Corp. (the "**Proposed Insider Purchaser**"), and this time for the purchase of "*substantially*" all the Applicant's assets and business (the "**Proposed Insider Transaction**"). The shareholders of the Applicant and the Proposed Insider Purchaser are identical.

Initial McEwan Affidavit at paras. 102 and 103.

19. The Applicant filed for and received initial CCAA protection the next day.

Order of The Honourable Chief Justice Morawetz dated September 28, 2021 [Initial Order].

The Applicant's Self-Serving, Abusive and Preferential CCAA Initiative

20. In its supporting materials for initial CCAA relief, the Applicant foreshadows the motion which it has unilaterally scheduled for next week to approve the Proposed Insider Transaction, specifically confirming that the Applicant "*did not complete a third-party sale process to canvass potential interest from third parties in respect of acquiring the [Applicant] or the Business*." The Applicant supposedly "*believes there is no prejudice to stakeholders from not having completed a third-party sale process*."

Initial McEwan Affidavit at paras. 102 and 103.

21. As matters stand, the only liabilities excluded from the Proposed Insider Transaction (other than the Applicant's CCAA expenses, which are to be funded from a separate cash reserve) are the lease obligations in respect of McEwan Yonge & Bloor, and a second location called Fabbrica Don Mills. All other liabilities, including pre-filing liabilities, are to be assumed, and the Monitor confirms that the Applicant has already paid "*approximately $500,000 to third-party suppliers in respect of goods and services provided prior to the Filing Date*."

Initial McEwan Affidavit at paras. 105 and 106.
First Report of the Monitor dated October 5, 2021 [First Report] at para. 3.9.

22. The Fabbrica Don Mills location is one of several leases that the Applicant has with another landlord, Cadillac Fairview, which other leases are proposed to be assumed under the Proposed Insider Transaction. This has apparently allowed for "*ongoing discussions to reach mutually satisfactory arrangements in respect of the Cadillac Fairview Leases*," such that "*there is no claim amount included in respect of the Fabbrica Don Mills [location] as part of the purchase price under the [Proposed Insider Transaction]*."

Initial McEwan Affidavit at paras. 105 and 108.

23. In substance, therefore, the only liabilities being excluded from the Proposed Insider Transaction on a non-consensual basis are the lease obligations in respect of McEwan Yonge & Bloor. In other words, everything else gets assumed (including pre-filing claims on a preferential basis), and First Capital is the proverbial "ox being gored."

Initial McEwan Affidavit at paras. 105, 106 and 108.

24. To supposedly compensate First Capital, the Proposed Insider Transaction contemplates a so-called "**Base Purchase Price**" of $520,000, "*calculated based on an amount equal to the damages in respect of the lease relating to the McEwan Yonge & Bloor Excluded Location as determined pursuant to the formula set forth in section 136(1)(f) of the [BIA]*." This, notwithstanding that: (i) the minimum annual rent under the lease is approximately $1.15 million (as described above): (ii) the lease is not scheduled to expire until the year 2033; and (iii) section 136(1)(f) of the BIA applies to bankruptcies, and the Applicant is not bankrupt.[1]

Initial McEwan Affidavit at paras 107 and 108.
***Bankruptcy and Insolvency Act* (Canada) [*BIA*].**
McEwan Yonge & Bloor Lease, Exhibits to McEwan Cross-Examination.

[1] It is unclear why the Applicant in a CCAA proceeding would propose to employ the priority waterfall scheme in a bankruptcy, other than to avoid the much more conventional (and much more generous) "proposal" formula under section 65.2(4) of the BIA for disclaimed leases. It is also noteworthy that, despite the Applicant's desire to rid itself of the McEwan Yonge & Bloor Lease, it has not disclaimed this lease.

25. First Capital is therefore understandably concerned about the Applicant's supposed good faith belief that "*there is no prejudice to stakeholders from not having completed a third-party sale process*" and that the Proposed Insider Transaction arises from "*a process that is fair and reasonable to all stakeholders*." Indeed, allowing this CCAA proceeding to continue without a sale process would deprive the only stakeholder whose obligations are being forcibly excluded from the proposed insider deal to recover additional monies that would rightly flow to it if the market generated a better deal.

Initial McEwan Affidavit at paras. 102 and 103.

26. In this case, a "better" deal would be one with a very low bar. Despite the Proposed Insider Purchaser being "*a newly formed company owned by the [Applicant]'s current shareholders [of Mr. McEwan and Fairfax],*" they are apparently only prepared to pay aggregate consideration of the Base Purchase Price ($520,000), cure costs and the assumption of the assumed liabilities.

Initial McEwan Affidavit at paras. 35 and 102.

Section 2.7(a) of the purchase agreement appearing at page 176 of the Applicant's application record dated September 28, 2021.

27. Mr. McEwan describes his business as "*high-end*," "*gourmet*" and one with which his "*personal name is associated*." At the same time, he paradoxically claims that his continued involvement "*is premised on a continuation of [his] partnership with Fairfax as co-owners*," to the exclusion of considering: (i) partnering with others who might actually value the business at something more than just its liabilities (and, even then, not all its liabilities); and/or (ii) an outright arm's-length purchaser, who may see more value in ousting Mr. McEwan altogether if Mr. McEwan is not prepared to remain on board.

Initial McEwan Affidavit at paras. 1, 5 and 113.

28. Conveniently, and without running a sale process to test his assumptions, Mr. McEwan: (i) alleges that "*The[Applicant] and its shareholders do not believe that a third party purchaser would be in a position to acquire the assets of the Business, without [his] continued involvement in the Business, for a similar or higher price*;" and (ii) pre-emptively "*anticipates*" that he would not remain if the business were sold to a third party purchaser. These are nothing more than self-serving statements to try and maintain control of his business for as little money as possible (particularly considering Mr. McEwan's admission on cross-examination that his involvement with Fairfax only developed because "*They basically knocked on my door and asked if I would be interested in -- in selling a piece of my business*").

Initial McEwan Affidavit at para. 113.
McEwan Cross-Examination, at question 67.

29. The Applicant also purports to hold First Capital and the Court hostage by alleging that go-forward financing of the CCAA process is somehow conditional on the Court approving the Proposed Insider Transaction, notwithstanding that the shareholders of the Proposed Insider Purchaser are the same as the CCAA Applicant. No independent DIP financing is proposed.

Initial McEwan Affidavit at para. 109.

30. The Applicant's self-serving, contradictory and hostage-taking approaches to this CCAA proceeding are perhaps best illustrated by the following exchange from Mr. McEwan's cross-examination:

> 156 Q. [The lease with First Capital] wasn't what you thought it was going to be; correct?
>
> A. 100 percent correct.
>
> Q. And I think in your affidavit, you made a -- you acknowledge you made a mistake; correct?

> A. I think -- I think First Capital made a mistake as well anticipating that this property would perform to the degree that they thought it would, and I made a mistake – the biggest mistake of my career was signing that lease with First Capital, and there's -- there's no -- there's no rectifying that business situation.
>
> Q. Okay. And so I'm assuming you're going to give instructions to your advisors to disclaim that lease; right? To terminate –
>
> MR. CHADWICK: I can – that's a legal question, so we don't need to get into that.
>
> MR. GRAFF: Well, I guess I can ask you in more layperson terms, Mr. McEwan, though you're a pretty sophisticated guy. It's your intention to terminate that lease; correct?
>
> A: It seems the only obvious action that makes any sense.
>
> Q: Okay. Any reason why you haven't done it yet?
>
> A: Well, we were -- we were looking to have a conversation once we filed for CCAA. Being that we had no success with First Capital prior in our conversations, and they seem to be deteriorating each and every time we had a conversation, we felt that it was imperative that we had CCAA in place in order to have a conversation.
>
> **McEwan Cross-Examination, at question 156 and onward.**

It is unclear how a good faith CCAA "*conversation*" can occur where the Applicant initiates the proceeding by announcing – right out of the gate – that it is going to seek immediate approval of an impermissible sale to itself, which impermissible sale cuts-out the very stakeholder with which it supposedly wants to have this "*conversation*."

PART III – ISSUES

31. The primary disputed issue at the Comeback Hearing is whether the Applicant should be allowed to continue this CCAA proceeding without proposing and then implementing a satisfactory Court-approved marketing and sale process for the Applicant's assets or business, as applicable, with the input of the Monitor and stakeholders, for the purpose of testing the market prior to seeking Court approval for any sale transaction, which will otherwise occur imminently and to stakeholder detriment. The secondary (and related) issue to be considered is the appropriate disclosure that ought to be made by the Applicant and the McEwan Subsidiary.

PART IV – LAW AND ARGUMENT

32. This Court is statutorily prohibited from granting a new order extending the stay of proceedings from the Initial Order (the "**Stay**") unless the Applicant satisfies the Court that: (i) "*circumstances exist that make the [new] order appropriate*;" and (ii) the Applicant "*has acted, and is acting, in good faith and with due diligence.*"

CCAA, s. 11.02.

33. What is appropriate for the new order, and whether parties are acting in good faith and with due diligence, is linked directly to the CCAA "*building block*" approach identified by The Honourable Regional Senior (now Chief) Justice Morawetz in *Target*, whereby the initial steps taken in the proceeding act as the foundation upon which subsequent steps are built. Care must therefore be taken at the outset to ensure that the foundation is appropriate, which, at the very least, means that the foundation cannot be so egregiously flawed that it would compromise the integrity of the layers to be built above it.

***Target Canada Co. (Re),* 2016 ONSC 316 [Commercial List] (CanLII: https://canlii.ca/t/gn05p) [*Target*] at paras. 81-86.**

34. First Capital is not opposed to the continuation of these CCAA proceedings or the extension of the underlying Stay, provided that the foundational terms are not so egregious that they compromise the integrity of what is to come. Unless immediate steps are taken, the Applicant has been very clear that it will be back before the Court next week to seek approval of the Proposed Insider Transaction, and has already served a motion record in this regard. The pursuit of such a motion, in the absence of first running a satisfactory sale process, would literally turn the CCAA "*building block*" approach on its head, and be a complete waste of resources.

> ***Target, supra* at paras. 66-69 and 81-86.**

35. It is trite law that the *Soundair* principles, the factors listed in section 36(3) of the CCAA and the factors listed in section 65.13(4) of the BIA all place a great deal of importance on the sale process. When asked to approve a sale, the Court is invited to assess the reasonableness, efficiency, integrity and fairness of the sale process.

> ***Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) (CanLII: https://canlii.ca/t/1p78p) [*Soundair*].**
>
> **CCAA, s. 36(3) and BIA, s. 65.13(4).**
>
> **Jason Dolman and Gabriel Faure, "Preplan Sales under Section 65.13 BIA and Section 36 CCAA" (2017) 59 Canadian Business Law Journal 333 [Preplan Sales] at s. II.2, "Reasonableness and Fairness of the Sale Process." (https://ln5.sync.com/dl/776527c90/k8wg62gb-cn65ghcn-vk8rf3rn-4882gz63).**
>
> ***8901341 Canada inc. c. Bloom Lake, g.p.l.*, 2015 QCCA 754 (CanLII: https://canlii.ca/t/ghfm0) at [*Bloom Lake*] at paras. 8-9.**

36. Accordingly, even if the stated purpose of this CCAA proceeding were to approve a pre-packaged *arm's length* transaction, the very foundation of the proceeding would be called into question in the absence of running a sale process. Simply put, the Court cannot assess the reasonableness, efficiency, integrity and fairness of the sale process if there is no sale process.

> ***Target, supra* at para. 81.**
>
> **Preplan Sales, *supra*, at s. II.2, "Reasonableness and Fairness of the Sale Process."**
>
> ***Bloom Lake, supra*, at paras. 8-9.**

37. However, the stated purpose of this CCAA proceeding goes one step further, namely, the approval, without a sale process, of this entirely *non-arm's length* Proposed Insider Transaction. Whereas a sale process seeks to ensure maximum realization by obtaining as many advantageous offers as possible from a range of potential purchasers, "*[t]he identification and solicitation of potentially interested purchasers has a heightened importance if a sale to a person related to the debtor is envisaged, given that, in such circumstances, the debtor has an interest in selling its assets for a price below fair market value*."

Preplan Sales, *supra*, at s. III.2, "Sale to a Related Party."

38. In *Elleway Acquisitions*, The Honourable (now Chief) Justice Morawetz noted that when the Court is asked to authorize sales to related parties, the Court "*will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sale process … [and] ensure the process was performed in good faith*." Indeed, pursuant to both section 36 of the CCAA and 65.13 of the BIA, the Court is prohibited from approving a related-party sale unless, amongst other things, "*good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the [Applicant]*."

Preplan Sales, *supra*, at s. III.2, "Sale to a Related Party."

***Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 [Commercial List] (CanLII: https://canlii.ca/t/g25ss) [*Elleway Acquisitions*] at paras. 44-45.**

CCAA, s. 36(4).

BIA, s. 65.13(5).

39. The case of *Hypnotic* illustrates the degree to which the foregoing provisions are strictly applied. In that case, The Honourable Justice Cumming refused to allow a related-party sale because His Honour was "*not satisfied that good faith efforts have been made to sell or otherwise dispose of [the debtor's] assets to unrelated parties*." His Honour arrived at this conclusion despite having also found that:

(a) "*there is no market for any third party to purchase the assets and operate from the current location*;"

(b) "*The Proposal Trustee approves the process leading to the proposed sale*;"

(c) the Proposal Trustee opined that the proposed sale "*provides for a superior realization to the secured and arms-length unsecured creditors .... [and] permits the business to continue...[with] ongoing employment for 157 [7 full time and 150 part time] employees*;" and

(d) "*It is obvious that a deemed assignment into bankruptcy by s. 50.1 (8) [of the BIA], consequential to no proposal having being made, will quite probably result in [the] unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of [the debtor's] assets through the proposed [related transaction]*."

Hypnotic Clubs. Inc. (Re), 2010 ONSC 2987 [Commercial List] (CanLII: https://canlii.ca/t/29vps) [*Hypnotic*] at paras. 26, 27, 32 and 37.

40. In the present case of restaurants, grocery stores, food halls and catering services, there is nothing extreme or unusual about the Applicant's business or circumstances that displace the basic foundational requirement for a third-party sale process in the context of a related-party sale (which, in this case, is really a ***same***-party sale). The Applicant sought the advice of very sophisticated insolvency professionals months ago, which could have easily designed or even implemented a sale process had the Applicant wished to do so in preparation for this CCAA proceeding. Instead, Mr. McEwan's evidence is that "*the [Applicant] determined, in consultation with its counsel, that a third-party sale process was not necessary in the circumstances and could have a negative effect on the ongoing Business of the [Applicant]*."

Initial McEwan Affidavit at para. 101.

Affidavit of Dennis Mark McEwan sworn October 1, 2021 [Subsequent Affidavit] at paras. 24 and 36.

41. Rather than working proactively to address the foundational CCAA sale process requirement, the Applicant spent its pre-filing resources on the self-serving Reviewable Insider Transaction and Proposed Insider Transaction. Now, months later, it does not lie in the mouths of the Applicant or its financial backers to say they have no resources to conduct a sale process. Any concern now about go-forward funding is entirely self-manufactured and self-serving (particularly as the proposed buyer and seller are funded by the same parties), and is nothing more than a shameless intentional effort to restrict the market of potential purchasers to the Proposed Insider Purchaser for the lowest price, representing very real stakeholder prejudice.

Subsequent Affidavit at paras.35-36.

42. Accordingly, it is respectfully submitted that the foundational building block of a marketing and sale process must be ordered and implemented as a prerequisite to the Applicant bringing a motion to approve its insider deal. Permitting the Applicant to bring its sale approval motion next week, without having run a sale process, "*does not have even a reasonable chance of success*" based on the requisite statutory and jurisprudential tests. Proceeding with such a motion "*in these circumstances would only result in a waste of time and money,*" and represents neither the good faith nor the due diligence that are required from the Applicant at this Comeback Hearing. Next week's Court time would be much better utilized to approve a sale process, if an acceptable one can be formulated in time.

> ***Target, supra* at paras. 66-69.**
> **CCAA, s. 11.02.**

43. Similarly, and in parallel with the structuring and presentation of a satisfactory sale process, the Applicant should also be required to provide thorough and satisfactory disclosure about not only the Applicant itself, but also about the McEwan Subsidiary's 50% interest in the ONE Restaurant Partnership, which interest was assigned by the Applicant shortly before this CCAA proceeding commenced via the Reviewable Insider Transaction. This information is required to: (i) allow prospective purchasers and the Court to assess what assets truly comprise the sale portfolio; and (ii) be responsive to the Applicant's duty to employ "*<u>good faith efforts</u> … to sell or otherwise dispose of the assets to persons who are not related to the [Applicant].*"

> **CCAA, ss.11.02 and 36(4) [emphasis added].**

44. Outside the CCAA context, "*It is a basic principle that a party who files an affidavit as evidence in a proceeding is obliged to produce any material referred to in that affidavit at the request of any other interested party*." In *Clover*, when considering the discretion of the CCAA Court to override this otherwise "*basic principle*," The Honourable Justice Koehnen observed:

> *One factor relevant to the exercise of [such] discretion is to consider the way in which a party has used the contested document in its affidavit. A passing, incidental reference to a document may lead a court to exercise its discretion against production. Reliance on the document for a material issue before the court may incline the court towards production.*
>
> ***The Clover on Yonge Inc.*, 2020 ONSC 5444 [Commercial List] (CanLII: https://canlii.ca/t/j9g09) [*Clover*] at paras. 6-11.**

45. In the present case, the Applicant directly references and relies upon its interest in the ONE Restaurant Partnership Agreement in the Initial McEwan Affidavit when asking the Court to extend the Stay to the McEwan Subsidiary, which is a non-applicant in this CCAA proceeding. It is also evident that the ONE Restaurant Partnership Agreement and its underlying business/financial situation represent an important component of the Applicant's overall business/financial situation, which is the very subject matter of this entire CCAA proceeding. Both the Court and prospective purchasers ought to have access to this information as a precondition to any "*good faith*" sale initiative.

> **Initial McEwan Affidavit at paras. 18(b) and 37-38.**
>
> **CCAA, ss. 11.02 and 36(4).**
>
> ***Clover*, supra at paras. 6-11.**

PART V – CONCLUSION AND RELIEF REQUESTED

46. On the initial return date, His Honour commented that the Applicant "*is seeking court protection from its creditors and has resorted to the CCAA to achieve its objectives. It does not lie with [the Applicant] to alter the notice provisions [prescribed by the CCAA] to suit its purposes*."

> **Endorsement dated October 1, 2021, at para. 39.**

47. Similarly, it does not lie with the Applicant to alter the other foundational (and, frankly, much more substantive and impactful) provisions prescribed by the CCAA. No doubt that filing for CCAA protection provides the Applicant with a significant degree of negotiating leverage, but the Applicant must still abide by the foundational CCAA rules in exercising such leverage, including, without limitation, not threatening to seek approval for a related-party transaction in clear contravention of section 36(4) of the CCAA, much less threatening to do so in one week's time. Such a threat is not a negotiation (or a "*conversation*," as Mr. McEwan phrased it on cross-examination) – rather, it is nothing but a hostage-taking exercise and an abuse of the statute.

48. The foundational CCAA "*building block*" approach requires the Applicant to change course immediately from its current approach, which, as currently structured, is nothing more than an entirely self-serving, abusive and preferential initiative. First Capital is not opposed to the continuation of this CCAA proceeding, but it must be on terms that are respectful of the statute and its legitimate purposes. Allowing the Applicant to continue to conduct this CCAA proceeding as it proposes to do would set an extremely dangerous precedent for other debtors seeking to emerge from the Covid-19 pandemic by misusing and abusing the CCAA and other insolvency and restructuring regimes, and would set-back landlord rights considerably and without reason.

49. It is respectfully submitted that the Initial Order not be amended, restated or continued in the absence of the substantive changes described at paragraph 3 of this factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2021.

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SCHEDULE "A"

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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

Stays, etc. — initial application
11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

…

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement

for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the trustee approved the process leading to the proposed sale or disposition;
>
> (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

…

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period

beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (chambre de compensation)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (membre)

creditor includes a surety or guarantor for the debt due to the creditor; (créancier)

margin deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (dépôt de couverture)

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of person who is privy

(3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

…

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

….

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN ENTERPRISES INC.

Court File No.: CV-21-00669445-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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